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In the Supreme Court of the United States

SANDRA MARTINEZ-RODRIGUEZ,
Petitioner,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL OF THE UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

The crux of this case is simple: the Circuit Courts are currently divided on a major question of civil procedure in immigration appeals. Two courts of appeals—the Third and Fourth Circuits—have taken the position that they have jurisdiction to review a refusal by a single-member of the Board of Immigration Appeals ("BIA") to assign an alien's appeal to a three-member panel under 8 C.F.R. § 1003.1(e)(6). *Quinteros-Mendoza v. Holder*, 556 F.3d 159 (4th Cir. 2009); *Purveegiin v. Gonzales*, 448 F.3d 684 (3d Cir. 2006). In the view of these circuits, courts have the power to review such a refusal because it presents a question of law: whether the single board member's decision to "streamline" an alien's appeal either was contrary to law or amounted to an abuse of discretion under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(a)(2). *See, e.g.*, *Quinteros-Mendoza*, 556 F.3d at 164. Conversely, three other courts—the Second, Eighth, and Tenth Circuits—have held that they lack jurisdiction to review such a refusal because the issue concerns discretionary administrative rules and is therefore inappropriate for judicial review. *Kambolli v. Gonzales*, 449 F.3d 454 (2d Cir. 2006); *Bropleh v. Gonzales*, 428 F.3d 772 (8th Cir. 2005); *Tsegay v. Ashcroft*, 386 F.3d 1347 (10th Cir. 2004). The circuit courts are thus split on a fundamental question that only this Court can adjudicate: whether agency streamlining decisions are immunized from federal judicial review.

Rather than acknowledge and confront this circuit split, the government has attempted obfuscate the issue. *First*, by proposing in their brief in opposition that the Tenth Circuit's decision in the instant

action "is correct," the government attempts to wipe away a major item of confusion in the courts. Opp. 9. But the government's legal arguments are flawed—and, at best, all the government has done is taken a side in the very debate that divides the circuits. *Second*, the government insists that the decision below "does not conflict with a decision of any other court of appeals," Opp. 9, a position it can only maintain by taking an extraordinarily narrow view of the question presented. Review of the relevant decisions, however, establishes that the Tenth Circuit's approach to this jurisdictional issue squarely conflicts with the holdings of other circuits—a fact some circuits have expressly recognized. *Finally*, the government urges that review is unnecessary by insisting that the streamlining system is constitutional in design, an argument that disregards the systemic legal failings evidenced by the system in practice.

Thus, while the government suggests that review is unnecessary, it is unable to respond to the most salient points in Petitioner's opening brief, including that the advent of streamlining has "had a substantive effect upon BIA decisionmaking." Pet. 28. Instead, the government's brief labors unsuccessfully to cast minority opinion as settled law. This Court should thus grant the petition for a writ of certiorari and resolve an issue that is vexing the circuit courts.

1. The government's initial argument against review—that courts lack review of streamlining procedures because streamlining is not a "final agency action"—misconstrues the relationship between an interlocutory streamlining decision and a final decision by the BIA on the merits. Opp. 9–10. Petitioner is asking that the court consider a procedural ques-

tion, one that courts have noted is independent of merits and thus is not barred by 8 U.S.C. § 1252(a)(2)(B). *See Quinteros-Mendoza*, 556 F.3d 159; *Purveegiin*, 448 F.3d 684. The government's position that 8 U.S.C. § 1252(a)(2)(B) bars such review has thus been rejected by several courts. The government cannot obviate the need for this Court's review by simply taking a side in an open debate and deeming it settled law.

According to the government, a BIA member's intermediate decision refusing "to forward the case to a three-judge panel" is not reviewable because it is not a final order. Opp. 9. Similarly, the final order denying cancellation of removal is not reviewable "because the [Immigration and Nationality Act] specifically provides that 'no court shall have jurisdiction to review any judgment regarding an alien's' application for cancellation of removal." Opp. 9–10 (quoting 8 U.S.C. § 1252(a)(2)(B)(i)). The government's position amounts to a "heads-we-win, tails-you-lose" argument: the procedural decision cannot be reviewed because it is not final, and the final decision cannot be reviewed because the merits of Petitioner's BIA appeal did not turn on a question of law. But the law simply does not dictate such a circular result.

The government's first objection—that the streamlining decision is neither a "final order" under the Immigration and Nationality Act ("INA") nor a "final agency decision" under the APA is, at best, misdirected. Petitioner does not dispute that, *at the time* the procedural decision to streamline her case was made, there was no final order or action capable of judicial review. Just as with appellate review of district court judgments, however, such interlocutory

procedural decisions are readily reviewable once a final order is entered at a case's conclusion.

> During the course of agency investigations, factfinding, and hearings, the agency can make several decisions which substantially affect the outcome of the agency action. These decisions are not considered final orders but rather are usually intermediate, interlocutory orders. . . . Any adverse interlocutory order will stand until a final order has been reached and at that time both the final order and any contested intermediate order are capable of judicial review.

33 Charles Alan Wright, Federal Practice and Procedure § 8304 (3d ed. 2006); *see also* 5 U.S.C. § 704 ("A preliminary, procedural, or intermediate agency action or ruling not directly reviewable *is subject to review on the review of the final agency action.*") (emphasis added), *quoted at* Opp. 9. This rule applies even if the merits of the eventual final order are committed to agency discretion or otherwise unreviewable. *Cf. Fox TV Stations, Inc. v. FCC*, 280 F.3d 1027, 1039 (D.C. Cir. 2002) (reviewing process underlying FCC rulemaking notwithstanding agency objection that final rules themselves were committed to agency expertise). Therefore, once the BIA enters a final order in a given case, any interlocutory decisions become susceptible to judicial review.

Here, there is no dispute that the interlocutory streamlining decision was followed by a BIA "final order." *See, e.g.*, Opp. 9 ("[T]he final order in this case was the single-member BIA decision that affirmed the [Immigration Judge's] denial of petitioner's request for cancellation of removal."); Opp.

10 (recognizing single-member BIA decision as final agency action for purposes of APA). Under ordinary operation of the merger rule, the BIA's prior procedural decision to streamline the case merged into this final order. Petitioner thus agrees with the government that the streamlining decision was not reviewable on its own. Nonetheless, because a final decision has since been made by the BIA in Petitioner's case, the interlocutory streamlining decision is now eligible for judicial review.

The government attempts to evade this straightforward conclusion by arguing that "in this case, the INA expressly deprived the court of appeals of jurisdiction to review the final agency action." Opp. 10 (citing 8 U.S.C. § 1252(a)(2)(B)(i)). But Section 1252(a)(2)(B)'s jurisdiction-stripping reach is not nearly so broad. Rather, as the government concedes in a footnote, the bar to review of "any judgment regarding the granting of relief" under the cancellation-of-removal statute expressly *preserves* jurisdiction over "review of constitutional claims or questions of law" raised by such challenges. Opp. 10 n.4. Working in tandem, Section 1252's jurisdictional provisions thus serve to preclude review of purely discretionary decisions—such as the merits of Petitioner's cancellation-of-removal request—while preserving review of purely legal questions—such as Petitioner's challenge that the BIA violated the law by streamlining her appeal. *See, e.g., Subhan v. Ashcroft*, 383 F.3d 591, 594 (7th Cir. 2004) (holding that 8 U.S.C. § 1252(a)(2)(B) bars judicial review of the merits of adjustment of status decisions but does not bar all review of the process that leads to those decisions).

In other words, the government is incorrect when it states that, in this case, "the INA expressly deprived the court of appeals of jurisdiction to review the final agency action." Section 1252(a)(2)(B) only precludes jurisdiction to review *certain issues* raised by final agency actions in cancellation-of-removal proceedings: specifically, the purely discretionary decision of whether or not to cancel removal. Questions of law raised by such a "final agency action" remain reviewable notwithstanding the INA's jurisdiction-stripping provision—and, therefore, the interlocutory question of law raised by the BIA's decision to streamline a case is reviewable as part of that "final agency action." *See Quinteros-Mendoza*, 556 F.3d 159 (reviewing streamlining decision; "In certain circumstances, our review of the BIA's final order must include a review of the procedures by which the BIA obtained that result."); *Purveegiin*, 448 F.3d 684. Thus, neither the INA nor the APA bar to Petitioner's challenge to the BIA's streamlining decision.

2. Even if the government were correct, however, it nevertheless would only be adopting one side of a question that has divided the courts of appeals. Pet. 16–22 (detailing circuit split regarding review of BIA decisions to issue single-member opinion under 8 C.F.R. § 1003.1(e)(5)); *see also* Pet. 22–26 (detailing closely related split regarding review of decisions to affirm without opinion under § 1003.1(e)(4)).

Unable to deny that such splits exists, Opp. 11–13 & nn. 5–6, the government instead urges that they are not implicated by the decision below, Opp. 11, 12. The government hinges its argument on a claim that all of the decisions recognizing jurisdiction over streamlining determinations arose in situations

"where the court [of appeals] *also* ha[d] jurisdiction to entertain a petition for review of the final order of removal." Opp. 11. According to the government, none of these opinions conflict with the decision below, which held that the court lacked jurisdiction to review the substantive merits of the BIA's decision regarding Petitioner's immigration status. In taking such a position, the government ascribes unwarranted importance to an irrelevant procedural detail, subtly distorting the procedural history of central pro-jurisdiction precedent in the process.

Despite the government's attempt to recharacterize the legal landscape, the courts of appeals that have considered the question of appellate jurisdiction over streamlining decisions have not based their decisions upon any finding of jurisdiction to review the substantive merits of a petitioner's challenge to a BIA decision. Although some courts refusing to review streamlining decisions have suggested that merits jurisdiction might alter their analysis, *see, e.g.*, *Tsegay*, 386 F.3d 1347, the principal cases finding jurisdiction have not relied on any such factor. *Quinteros-Mendoza*, 556 F.3d 159; *Purveegiin*, 448 F.3d 684. As a result, regardless of whether these decisions finding jurisdiction arose in identical procedural postures to the decision below, their holdings and underlying logic stand in direct conflict to the Tenth Circuit's erroneous disposition of this case.

For example, the government alleges that the decision below does not conflict with the Fourth Circuit's decision in *Quinteros-Mendoza*, a case in which the court of appeals asserted both jurisdiction to review a streamlining decision and jurisdiction to review the underlying merits of the applicant's claim to

asylum. Opp. 11; *see also* 556 F.3d at 164–165. The Fourth Circuit's analysis of the streamlining issue, however, makes no reference to the Court's underlying merits jurisdiction. 556 F.3d at 161–164. Instead, the Fourth Circuit engaged in the exact analysis urged by Petitioner's in this case: it considered whether the streamlining regulations are susceptible to judicial review, concluded that they were under the Administrative Procedures Act, and then held *without qualification* that "we do have jurisdiction to decide whether the BIA's decision to streamline a case under 8 C.F.R. § 1003.1(e)(5)–(6) (2008) was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Id.* at 164. Nothing in *Quinteros-Mendoza* suggests that this holding should somehow be limited based on whether the court of appeals also possesses jurisdiction over other potential challenges to the BIA's substantive decision in a given case.

Purveegin, the Third Circuit's leading decision regarding the reviewability of streamlining decisions, makes the irrelevancy of the government's proposed distinction even plainer. In that case, streamlining jurisdiction was the only issue addressed by the court of appeals, making it clear that such jurisdiction did not hinge upon the reviewability of any underlying merits issues. *See generally* 448 F.3d 684. Yet, the Third Circuit nevertheless considered the streamlining regulations, found them susceptible to judicial review, and reversed the BIA's decision to resolve the case through a single-member opinion under 8 C.F.R. § 1003.1(e)(5). As with the Fourth Circuit's opinion in *Quinteros-Mendoza*, the Third Circuit's final holding was broad: 8 C.F.R. § 1003.1(e)(4)–(6) "impose affirmative limits on a

single member's authority to resolve an appeal without panel participation. These constraints provide judicially manageable standards by which a court may assess the Board's compliance with both the streamlining provisions and the single-member review procedures." *Id.* at 689 (citations omitted). The fact that, three years later in a separate appeal from a different BIA decision, the court found that it had jurisdiction to review the merits of Purveegiin's claim to asylum, *see Purveegiin v. Att'y Gen. of the U.S.*, No. 07-1227, 2009 U.S. App. LEXIS 19180 (3d Cir. Aug. 25, 2009), does nothing to limit the court's prior, broad holding—one that directly conflicts with the decision below.

It is therefore no surprise that the courts of appeals do not share the government's view that precedent on this issue is consistent throughout the circuits. Rather, numerous courts have recognized the split, either implicitly or explicitly. *See, e.g.*, *Purveegiin*, 448 F.3d at 691–692 (noting that the Third Circuit's view on this subject conflicts with the Eight Circuit's); *Quinteros-Mendoza*, 556 F.3d at 162 (stating that the Fourth Circuit had not previously felt the need to explain their "rationale for finding jurisdiction. We think it is worthwhile to do so now, in light of the division in the circuits on this question."); *see generally* Pet. 21–22, 32–33. In doing so, the courts of appeals have squarely understood that the Tenth Circuit's view, first articulated in *Tsegay* and applied in the decision below, forms a part of this split. *See Kambolli*, 449 F.3d at 459 (citing, *inter alia*, *Tsegay*; "Our sister circuits have split, however, on the question of whether Courts of Appeals are vested with jurisdiction to review the Board's decision to have a particular case decided by a single

member rather than by a three-member BIA panel.").

In short, despite the government's efforts to claim otherwise, the decision below stands in direct conflict with the holdings of several other circuit courts. As a result, the petition properly presents, for this Court's review, a jurisdictional issue that has divided the courts of appeals. With the circuit courts asking for help with an uncertain doctrine, the government cannot simply wish the problem away.

3. The government concludes its short opposition with a general paean to the constitutionality of the streamlining regime, coupled with an argument that it could, if it desired, eliminate three-member BIA panel review entirely without offending due process concerns. Opp. 13–15. However, such observations do nothing to eliminate the government's obligation to comply with the legal procedures it has instituted. If, as Petitioner argues, the streamlining regulations create "judicially enforceable standards that constrain the decisionmaking of BIA members," *see* Pet. 33–38, then the constitutionality of the streamlining system writ large is no excuse for a BIA member's failure to properly implement it in a given case. Rather, review of such legal determinations remains squarely within the jurisdiction and province of the federal courts.

The need for judicial intervention is even greater given the systemic failures evidenced by the practical realities of the streamlining system in action. The government insists that the system is working as intended, "enabl[ing] the Board to render decisions in a more timely manner, while husbanding its limited resources." Opp. 4. Yet Petitioner has demonstrated

the negative substantive effects that streamlining has had upon the *accuracy* of BIA decisionmaking. Although streamlining has allowed the BIA to review "an ever-increasing amount of appeals—thousands per month—the amount of *reversals* it grants has stayed surprisingly constant." Pet. 27–29. With Congress having made clear that the courts of appeals shall not review the discretionary elements of many immigration-related decisions, such as cancellation-of-removal determinations, there is all the more reason to insist that BIA review has teeth.

The government's brief in opposition thus does little to undermine this case's importance. Petitioner, like thousands of immigrants every year, relied upon the BIA appeals system to obtain fair determination of her legal rights. When electing to streamline appeals, BIA members are making classic decisions of law that have profound effects on applicants' rights. This Court should finally intervene, to make clear that such legal determinations are judicially reviewable.

CONCLUSION

For the reasons set forth above, as well as those in the petition for a writ of certiorari, the Court should review and reverse the Tenth Circuit's decision below.

Respectfully submitted,

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